CANCELLATION OF REMOVAL AND VOLUNTARY DEPARTURE: ISSUES IN APPELLATE ADJUDICATION

Thursday, April 20, 2017
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

AGENDA

This session will be held in the K.D. Rooney Training Center (Tower - 18th Floor)

This presentation will provide an overview of cancellation of removal under section 240A of the Immigration and Nationality Act and voluntary departure under section 240B of the Act. It will address the cancellation of removal framework for both lawful and non-lawful permanent residents and include a survey of burgeoning issues in the cancellation of removal area. The training will examine, among other topics, the effect of certain breaks in continuous physical presence and termination of presence. It will also discuss factors relevant to assessing good moral character and provide an overview of special rule cancellation of removal. The training will additionally cover adjudications issues relating to pre and post-conclusion voluntary departure. It will further discuss the advisals and adverse consequences associated with voluntary departure.

LEARNING OBJECTIVES:

By the completion of this session, attendees should:

- Understand the differences and background of lawful permanent resident, non-lawful permanent resident and special rule cancellation of removal;
- Be able to identify the impact of and differences between breaks in continuous physical presence and termination of presence;
- Be able to identify factors relevant to the assessment of good moral character;
- Understand pre and post-conclusion voluntary departure; and
- Identify the adverse consequences and advisals associated with voluntary departure.

9:30 – 10:00 a.m. **Registration**

10:00 – 10:05 a.m. **Introduction**
Amanda Adams
Senior Legal Advisor
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

10:05 – 10:15 a.m. **Cancellation of Removal Overview**
Joan Geller, Speaker
Attorney Advisor
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

10:15 – 10:35 a.m. **Termination of and Breaks in Continuous Physical Presence**
Joan Geller, Speaker
Attorney Advisor
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

10:35 – 10:55 a.m. **Good Moral Character Assessment**
Rosaly Kozbelt, Speaker
Attorney Advisor
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

10:55 – 11:05 a.m. **Break (NO CLE CREDIT)**

11:05 – 11:30 a.m. **Voluntary Departure Overview**
Ellen Liebowitz
Board Member
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

11:30 – 11:40 a.m. **Questions & Answers**

FACULTY BIOGRAPHIES

ELLEN LIEBOWITZ is a Board Member with the Board of Immigration Appeals. She was appointed to the position of Board Member by Attorney General Loretta E. Lynch in February 2016. She received a Bachelor of Arts degree in 1987 from the University of Delaware and a Juris Doctor in 1990 from the University of Maryland. From 2008 to January 2016, she served as a senior legal advisor to the chairman, Board of Immigration Appeals (BIA). From 2007 to 2008, she was a senior counsel to the chairman, BIA, and from 1991 to 2007, as an attorney advisor for the BIA. Prior to joining the board, she clerked for the Circuit Court for Harford County, Maryland. She is a member of the Maryland Bar.

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VOLUNTARY DEPARTURE[1]

Statute: INA § 240B.
Regulation: 8 CFR § 1240.26.
Leading decisions: *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2015); *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012); *Matter of Arguelles-Campos*, 22 I&N Dec. 811 (BIA 1999); *Matter of Cordova*, 22 I&N Dec. 966 (BIA 1999); *Matter of Ocampo-Uglade*, 22 I&N Dec. 1301 (BIA 2000).
Application: No written application is required; no fee

What is Voluntary Departure?

It allows a qualified alien to leave the country on his or her own accord without formal expulsion.

Three Types of Voluntary Departure:

- By DHS without initiation of removal proceedings;
- By the IJ in the initial stages of the removal case; or
- By the IJ at the conclusion of the removal hearings.

Aliens Not Eligible for Voluntary Departure:

1. **Arriving alien** is barred from pre-conclusion VD. INA § 240B(a)(4). Such alien may be allowed as a matter of discretion to withdraw the request for admission and depart without being placed in removal proceedings. INA § 235(a)(4).

2. **Prior grant of VD** - an alien who has been granted VD in the past after being found inadmissible under INA § 212(a)(6)(A) is barred. INA § 240B(c); *see also* 8 CFR § 1240.26(a) (bars alien who was previously granted VD and did not timely depart; 10 year limit).

3. **Deportable under INA § 237(a)(4)(B) (engaged in terrorist activity).** INA § 240B(a)(1).

4. **Deportable under INA § 237(a)(2)(A)(iii) (convicted of an aggravated felony).** INA § 240B(a)(1). Note that under the statutory language, the alien must be deportable for the aggravated felony conviction. An alien who is present without being admitted or paroled would be an applicant for admission, and thus would not be deportable (there is no ground of inadmissibility for aggravated felonies). **However, by regulation the Attorney General has extended this restriction to cover any alien who has been convicted of an aggravated felony, without regard to whether the alien is deportable for the conviction.** 8 CFR §§ 1240.26(b)(1)(i)(E), 1240.26(c)(1)(iii).

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[1] This handout presents an overview of VD law as of April 20, 2017. Not all VD regulatory and statutory provisions are discussed. This is not intended to be an exhaustive list of cases in this subject area, and new cases will emerge, so please conduct research accordingly. All cited cases should be independently assessed for appropriateness of use in a given decision.

Voluntary Departure Granted by DHS. 8 CFR 240.25.

1. May be granted by an authorized INS officer, on Form I-210, for not more than 120 days total and subject to any conditions the DHS considers necessary. 8 CFR § 240.25(b).

2. Denial is not appealable. 8 CFR § 240.25(e).

3. Is subject to revocation by written decision. 8 CFR § 240.25(f).

4. Failure to depart within the time authorized results in the imposition of penalties set out in INA § 240B(d). 8 CFR § 240.25(b). These include a fine of $1000 to $5000 and the loss of eligibility for adjustment of status, cancellation of removal or VD for at least 10 years. Note that these penalties apply although the DHS's grant of VD may have been processed entirely by correspondence without any personal appearance.

   The International Patient Act of 2000, Pub. L. No. 106-406, Act of Nov. 1, 2000, 114 Stat. 1755. For details on eligibility for this provision, which provides extended VD, *see* INA § 240B(a)(2)(B); 8 CFR § 217.4(a).

Voluntary Departure Granted by the Immigration Court.

Significant differences exist between the two forms of VD which may be granted by the IJ. ***See Chart: Voluntary Departure in Removal Proceedings*** for a summary of the most important differences. *See also Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999); *Matter of Cordova*, 22 I&N Dec. 966 (BIA 1999).

Note: that the IJ must enter an alternate order of removal, which takes effect upon the earliest event if the alien:

- Does not post any required bond within 5 business days (except as noted in 8 CFR § 1240.26(b)(4));
- Does not provide the travel document for inspection and copying by the date set; or
- Does not depart from the U.S. by the date set for departure, *unless* the IJ's order is the subject of a valid appeal.

Note: DHS may hold the alien in custody until any required VR bond is posted. 8 CFR § 1240.26(c)(3).

Note: The fingerprint and background check regulation, effective April 1, 2005, generally exempts the VD application from requiring such checks. 8 C.F.R. § 1003.47(j). However, this regulation also provides that, in any given case, the DHS may seek a continuance to conduct such checks and the IJ, in the exercise of discretion may grant the continuance and, if done, the 30-day period for the IJ to grant VD, as provided in 8 C.F.R. § 1240.26(b)(1)(ii) shall be extended accordingly.

Exceptions to the travel document requirement. 8 CFR § 1240.26(b)(3).

The travel document may be something less official than a passport. Some consulates issue a temporary travel document, such as a letter under seal, which is valid for return to one's country of citizenship. Some countries allow their citizens to travel back to the country on the strength of a national identity document, such as a Cedula de identidad. Further, if DHS is holding the alien's travel document, the alien needs to arrange to recover it, which can be discussed with the detention and deportation section of DHS.

Extension of Voluntary Departure. 8 CFR § 1240.26(f).

A period of VD may be extended only by the district director, and the original period granted plus the extension may not exceed 120 days for initial stage VD or 60 days for completion stage VD. (Note, the same provision is repeated in 8 CFR 1240.26(h)).

Reinstatement of Voluntary Departure. 8 CFR § 1240.26(f).

Although VD cannot be extended by order of the IJ or the Board, it may be reinstated if the case is reopened for some purpose other than solely making an application for VR. However, the case must be reopened before the original period of VD expires, and the total amount of VD granted in the original order and the order following reopening cannot exceed the applicable limit of 120 or 60 days. For example: R is granted 60 days VD in original order. After 30 days go by, the case is reopened by the IJ because of significant new evidence, such as a revolution in the R's country. The resulting asylum claim is eventually unsuccessful, 6 months later. The IJ can grant another 30 days of VD, but no more.

The Pros and Cons of Voluntary Departure for the Alien.

1. If alien hopes to immigrate or return to the U.S. in lawful status in the future, VD can be extremely important.

2. If alien is unlikely to ever have an opportunity to return to the U.S., VD becomes much less significant.

3. If alien is not detained at time hearings are completed, and local district office is not regularly taking into custody those aliens who are ordered removed from the U.S., a grant of VD which is not fulfilled creates new potential penalties (fine of $1000 to $5000 plus loss of important relief for 10 years in the future) which do not apply to an alien who attends the immigration court hearing and is ordered removed. However, the same penalties do apply if the IJ order is entered after a hearing in absentia. INA § 240(b)(7).

4. If circumstances indicate that the alien may be motivated to enter the U.S. illegally in the future, a grant of VD may diminish the potential criminal penalty if the alien is convicted of illegal entry.

5. Effect on unlawful presence in U.S. and the three-year and ten-year bars to re-admission. *See* INA § 212(a)(9)(B).

VOLUNTARY DEPARTURE IN DEPORTATION PROCEEDINGS

Statute: former INA § 244(e).
Regulation: 8 CFR §§ 240.56-57.

For deportation proceedings commenced with the issuance of an OSC before April 1, 1997, VD remains available under rules and case law which is generally less restrictive than the current rules for VD in removal proceedings.

More lenient aspects:

1. There is no limitation on the length of VD which may be granted, although one year was considered the longest period which could normally be justified.

2. No bond was required.

3. No minimum period of presence in the U.S. was required. However, aliens seeking admission in exclusion proceedings could not be granted VD.

4. It was not necessary to concede removability.

5. An appeal of any non-frivolous issue was available. However, the Board had no jurisdiction to consider an appeal challenging the length of VD as too short, so long as at least 30 days was granted.

6. A person is not required to present a travel document.

7. A person could be granted VD more than once.

Less lenient aspect: Each applicant for VD had to establish good moral character throughout the five-year period preceding the application.

VOLUNTARY DEPARTURE CASE LAW

Matter of Gamero, 25 I&N Dec. 164 (BIA 2010)

Pursuant to 8 C.F.R. § 1240.26(c)(3), an IJ who grants an alien VD must advise the alien that proof of posting of a bond with the Department of Homeland Security must be submitted to the Board of Immigration.

- Appeals within 30 days of filing an appeal and that the Board will not reinstate a period of VD in its final order unless the alien has timely submitted sufficient proof that the required bond has been posted.

- Where the IJ did not provide all the advisals that are required upon granting VD and the R failed to submit timely proof to the Board that a VD bond had been posted, the record was remanded for the IJ to grant a new period of VD and to provide the required advisals.

Matter of C-B-, 25 I&N Dec. 888 (BIA 2012)

When considering VD, if an R does not wish to waive appeal, the IJ must consider R for post-conclusion VD.

Matter of M-A-S-, 24 I&N Dec. 762 (BIA 2009)

An IJ may order an alien detained until departure as a condition of a grant of VD.

- The terms "continued detention" and "safeguards" are explicitly used in the regulations that establish the parameters under which DHS officials are authorized to grant VD.

- "The Service may attach to the granting of voluntary departure any conditions it deems necessary to ensure the alien's timely departure from the United States, including the posting of a bond, *continued detention* pending departure, and *removal under safeguards.*" 8 C.F.R. § 240.25(b) (emphases added)

- R argued that the regs governing the setting of VD by IJs differ from the regs governing the DHS, because the former do not contain the express power to detain an alien without bond. *Compare* 8 C.F.R. § 1240.26(c)(3) *and* 8 C.F.R. § 240.25(b).

- Although it does not contain the phrase "continued detention," 8 C.F.R. § 1240.26(c)(3) gives IJs broad discretion to set conditions for VD, including the continued detention of the alien until his or her departure from the United States.

- Where continued detention is ordered, it makes no sense to require a bond, because the purpose of the bond—to assure that R will appear for departure—is already fully served by the continued detention.

Matter of Zmijewska, 24 I&N Dec. 87 (BIA 2007)

An alien has not voluntarily failed to depart, when he, through no fault of his own, was unaware of the VD order or was physically unable to depart within the time granted.

Matter of Ocampo-Ugalde, 22 I&N Dec. 1301 (BIA 2000)

Pre-conclusion VD cannot be granted absent an express right of waiver of appeal by the alien or the alien's representative. The IJ told R that 120 days was the maximum time allowed for VD, but there was no express waiver of appeal in the record.

- It is crucial that the record clearly indicate that the right of appeal was actually and not merely constructively waived by the alien.

- To that end, the IJ must expressly explain to the alien that waiver of appeal is a precondition to receiving pre-conclusion VD.

- The only situation where the IJ may safely forgo such an oral notification is when the record contains a written stipulation or comparable documentary evidence wherein the alien, or the alien's representative of record, expressly waives appeal as part of establishing that all the regulatory requirements of this form VD have been established.

Matter of Arguelles-Campos, 22 I&N Dec. 811 (BIA 1999)

A close reading of it is highly recommended, as it gives the rationale for the two kinds of VD under INA § 240B.

- The Board found that the IJ erred when he applied the VD criteria applicable to an OSC deportation hearing to a removal setting in adjudicating pre-conclusion VD under INA § 240B(a).

- The criteria for the exercise of discretion for either version of 240B VD in removal proceedings are generally the same criteria considered for VD in deportation proceedings: the nature of the ground of removal/deportation at issue; additional violations of the immigration laws; the existence, seriousness, and recency of any criminal record; and other evidence of bad character and the undesirability of the applicant as a permanent resident. *See Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972) (VD discretion in a deportation hearing).

- Notes that there is no provision directing that if pre-conclusion VD is denied, the alien is precluded from appealing the denial. *Id.* at n. 1.

- In *Arguelles-Campo*, the alien had been granted VD on five previous occasions (apparently by Government agents), had been ticketed for driving without a license, and admitted he had been driving without a license for the past three years. The alien's equities consisted of two American-born children plus volunteer work at his church. However, the Board took note that the last VD occurred three months prior to the institution of removal proceedings, and commented the IJ could reasonably conclude that the alien was using VD simply as a means to avoid immigration proceedings.

- The alien cannot appeal the length of voluntary time granted, and an arriving alien cannot apply for pre-conclusion VD as per INA § 240B(a)(4). However, this provision should not be construed from precluding such aliens to move to withdraw their applications for admission in accordance with INA § 235(a)(4). *Arguelles-Campo,* 22 I&N Dec. at 814 n.2.

- The Board resolved the case by holding that, on the record, the alien could not establish that he deserved VD in the exercise of discretion and therefore found it unnecessary to remand the case to the IJ for further hearing.

Matter of Cordova, 22 I&N Dec. 966 (BIA 1999)

In this case, the Board faulted the IJ for not considering the alien for pre-conclusion VD under INA § 240B(a). The IJ had ruled that the alien was ineligible for VD as he had suffered a conviction which precluded him from showing good moral character under INA § 101(f)(7). The IJ never mentioned pre-conclusion VD, which does not require a showing of good moral character.

- At the master calendar stage of a case, the IJ has great flexibility to identify issues, make preliminary determinations as to whether the alien qualifies for various forms of relief from deportation, resolve uncontested matters, and schedule further hearings. Here, R, who had not been convicted of an aggravated felony and was not subject to deportation on national security grounds, was eligible for pre-conclusion VD which the IJ did not address.

- This failure violated the mandate of the regulation that the IJ inform the alien of relief from deportation for which he or she shows apparent eligibility.

- To ensure that all aliens are informed of pre-conclusion VD in a manner which allows them to timely apply, the IJ should notify any R who is apparently eligible for pre-conclusion VD and give the person an opportunity to apply for the remedy no later than at the master calendar hearing at which the case is initially calendared for merits hearing.

- This ruling does not supplant the ruling in *Matter of Arguelles-Campo, supra,* and does not alter or modify that ruling in any respect.

Narine v. Holder, 559 F.3d 246 (4th Cir. 2009)

This case highlights the importance of the distinction between pre-conclusion VD and post-conclusion VD. It emphasizes the importance of clearly distinguishing whether you are granting pre- or post-conclusion VD. When granting pre-conclusion VD, the IJ must ensure that R provides a knowing and intelligent waiver of the right to appeal.

Cases Addressing the Exercise of Discretion

- **Burden of proof** to show worthiness in the **exercise of discretion** is upon R. *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967); *Matter of Mariani*, 11 I&N Dec. 212 (BIA 1965). *See also* 8 CFR 1240.8(d) (discussing burden of proof when alien applies for relief).

- **Driving while under the influence** is extremely dangerous conduct and a serious adverse factor against granting VD. *See generally Villanueva-Franco v. INS*, 802 F.2d 327 (9th Cir. 1986).

- **Conviction for illegal entry** under 8 U.S.C. § 1325 is an adverse factor to be considered on the issue of VD discretion. *Matter of Rina*, 15 I&N Dec. 346 (BIA 1975).

  Suspension from non-immigrant student status is a significant factor in evaluating the application for VD, and can properly be considered as a separate, adverse factor in exercising discretion. *Hassan v. INS*, 66 F.3d 266 (10th Cir. 1995).

- **Prior grant of voluntary departure** and **illegal re-entries with aid of alien smuggler**. Alien first accepted VD which implied an agreement not to re-enter illegally but she re-entered twice with the alien of an alien smuggler. This afforded a proper basis to doubt her willingness to leave voluntarily and her implied promise not to return illegally, and supported a denial of VD. *Estrada-Posada v. INS*, 924 F.2d 916, 920 (9th Cir. 1990), *overruled on other grounds as stated in Suazo-Caldamas v. INS*, 992 F.2d 1220 (9th Cir. 1993). *Aguirre-Cervantes v. INS*, 242 F.3d 1169, 1176 (9th Cir. 2001).

- **Illegal entry with aid of alien smuggler** is a serious adverse factor against granting VD in the exercise of discretion in view of the significant impediment such conduct presents to the effective enforcement of this country's immigration laws. *Matter of Rojas,* 15 I&N Dec. 492 (BIA 1975); *see also Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013).

- **Prior pre-hearing grant of voluntary departure** is a factor to be considered on the issue of discretion. *Tupacyupanqui-Marin v. INS*, 447 F.2d 603, 606 (7th Cir. 1971); *Matter of M-*, 4 I&N Dec. 626, 628 (BIA 1952).

- **False statements to immigration officers.** The Board upheld discretionary denial adjustment of status to an alien who, on three separate occasions in applying for extensions of his stay as a non-immigrant student, stated he was not employed do justify the denial of his application. However, the Board found that VD warranted under the circumstances of the case. *Matter of Patel*, 17 I&N Dec. 597 (BIA 1980).

- **Obtaining a false immigration document.** R applied for and obtained a U.S. citizen identification card in the name of her deceased sister. Even if R did not give false testimony in connection with this application, it is an adverse factor that warrants denial of VD in the exercise of discretion. *Matter of O-*, 7 I&N Dec. 478 (BIA 1957).

- **Conviction for crime of domestic violence and acting as a ringer at a college exam.** R was convicted of a domestic violence offense and also acted as a ringer, taking college exams for others for pay. He had an U.S. citizen brother. The adverse facts were sufficient to deny VD in the exercise of discretion. *Matter of Lemhammad*, 20 I&N Dec. 316 (BIA 1991).

- **Time in the U.S. as an equity.** R entered this country as a non-immigrant student and shortly thereafter was convicted of burglary and placed in deportation proceedings. He had been in the US for 6 years. There was no abuse of discretion in denying VD, since R committed his crimes within a year of entering this country and had been under proceedings since that time. *Hassan v. INS*, 66 F.3d 266 (10th Cir. 1995).

- **De Minimis violation of status**. R overstayed his time as a non-immigrant and went to the INS office to ask for an extension of stay. He was arrested and placed in deportation proceedings. *Held:* No showing that alien did not possess good moral character; his overstay was de minimis in time and he was attempting to comply with the law. It is an abuse of discretion to deny VD on these facts. *Hegerich v. Del Guercio*, 255 F.2d 701 (9th Cir. 1958).

- **Criminal acts outside the 5-year voluntary departure period.** It is permissible to consider criminal acts taking place outside the 5-years period when ruling on the issue of VD discretion. *Villanueva-Franco v. INS*, 802 F.2d 327, 330 (9th Cir. 1986).

- **Alien unable to promise to remain outside the USA**. The fact that R could not promise that he would not again enter the U.S. illegally if granted VD was germane to a determination as to whether the remedy should be granted in the exercise of discretion. *Hernandez-Luis v. INS*, 869 F.2d 496 (9th Cir. 1989).

- **Intentional misrepresentations to immigration officers and IJ.** R paid $250.00 to an alien smuggler to assist her illegal entry and then made intentional misrepresentations of her name and marital status to both the immigration officer at the time of initial interview and to the IJ at the time of hearing. This was a valid basis for denying VD in the exercise of discretion. *Ramirez v. INS*, 550 F.2d 560, 566 (9th Cir. 1977).

- **Visa petition pending.** The fact that R is the beneficiary of a pending visa petition is a favorable factor on the issue of VD discretion. *Matter of Raol*, 16 I&N Dec. 466 (BIA 1978).

- **Lawful permanent resident sibling.** The fact that R has an immigrant sibling who may one day be in a position to file a visa petition on his or her behalf is a valid equity to be considered in the exercise of VD discretion. *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989) (case superseded on other grounds).

- **Disorderly conduct and other charges pending resolution.** At time of hearing, R had pending charge of arson against him. It arose from a violent Iranian student demonstration in the U.S. where police cars were burned and rocks thrown at police. R was involved in a violent confrontation with a police officer and was convicted of disorderly conduct and resisting arrest and fined $15.00. The denial of VD was upheld. R's conviction for acting improperly and violently against a police officer militates against him. In addition, that a serious felony charge was pending at the time of the deportation hearing can be considered an adverse factor. The fact that the charge was later dismissed does not change the result as the application for VD was judged on the facts in existence at the time of the hearing.

Parcham v. INS, 769 F.2d 1001 (4th Cir. 1985); *see also Arias-Minaya v. Holder*, 779 F.3d 49 (1st Cir. 2015) (upholding IJ's reliance on police reports in denying VD in the exercise of discretion).

- **Conviction not involving moral turpitude: possession of altered immigration documents under 18 U.S.C. § 1546.** This misconduct may justify a denial of VD on a discretionary basis. *Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992).

- **The respondent's contest of deportability is not an adverse factor.** R contested the charge of deportability by filing a motion to suppress the Government's evidence of alienage and deportability. The challenge failed, and R then requested VD. The IJ denied VD in the exercise of discretion, observing that R's challenge put the Government to a lot of trouble. The Board reversed, finding that the valid exercise of the privilege against self-incrimination should not be penalized by a denial of VD. *Matter of Tsang*, 14 I&N Dec. 294 (BIA 1973).

Other Significant Decisions

- **The respondent cannot carry the burden of proof on voluntary departure by standing mute.** R has the burden of proving that he merits VD in the exercise of discretion and is statutorily eligible for the remedy. If he stands mute on advice of counsel and refuses to answer relevant questions, the remedy should be denied as he has failed to carry his burden of proof. *See Matter of Yam*, 12 I&N Dec. 676 (BIA 1968); *Matter of Chen*, 12 I&N Dec. 603 (BIA 1968).

- **In some jurisdictions, voluntary departure is considered a right, and an Immigration Judge's failure to meaningfully advise an alien of his or her right to seek voluntary departure may therefore constitute a deprivation of due process, provided that the alien can demonstrate prejudice.** *See United States v. Melendez-Castro,* 671 F.3d 950, 954 (9th Cir. 2012); *United States v. Ortiz-Lopez*, 385 F.3d 1202 (9th Cir. 2004); *Ramirez-Garay v. Holder*, 490 F. App'x 816 (7th Cir. 2012); *see also Ademo v. Lynch,* 795 F.3d 823, 832 (8th Cir. 2015) (granting the petition for review where the Board "fail[ed] to exercise its discretion at all"); *cf. Kandamar v. Gonzales,* 464 F.3d 65, 69-70 (1st Cir. 2006) (concluding that voluntary departure is a privilege and there is no appeal); *Abu-Khaliel v. Gonzales,* 436 F.3d 627, 630-31 (6th Cir. 2006) (same).

- **The good moral character period is continuing.** R must show good moral character for the 5 years preceding the adjudication of the application for VD. *Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 794 n.1 (BIA 2005) (discussing continuing applications); *see also Aparicio-Brito v. Lynch*, 824 F.3d 674, 687 (7th Cir. 2016) (allowing consideration of R's conduct beyond the five year period where the phrase "at least 5 years" is used).

Cancellation of Removal and Voluntary Departure: Issues in Appellate Adjudication

Presented by Board Member Ellen Liebowitz,
Attorney Advisor Joan Geller, and
Attorney Advisor Rosaly Kozbelt

April 20, 2017

Cancellation of Removal Overview

Joan B. Geller
Attorney Advisor, BIA

LPR Cancellation of Removal

- INA § 240A(a) -

* **5 years of lawful permanent residence**
  * L.P.R. status must be lawfully obtained; one who acquired status by fraud or misrepresentation is not "lawfully admitted for permanent residence." *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003)

* **7 years of continuous residence after admission**
  * Admission in any status sufficient. *Matter of Blancas*, 23 I&N Dec. 458 (BIA 2002)
  * Adjustment of status counts as an admission

LPR Cancellation of Removal

- INA § 240A(a) -

* **No aggravated felony conviction**
  * Bar applies even if not charged as ground of removal
* **Not barred under section 240A(c) of the Act**
* **Warrants favorable exercise of discretion**

Non-LPR Cancellation of Removal

- INA § 240A(b)(1) -

* **10 years of continuous physical presence**
* **Good moral character during 10-year period**
  * Continuing application; no stop-time. *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005)
* **Not convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) of the Act**
  * Bar applies even if conviction is not basis for removal charge. *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009)
  * Offense is "described under" regardless of immigration-related aspects of those sections. *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010)

Non-LPR Cancellation of Removal

- INA § 240A(b)(1) -

* **Exceptional and extremely unusual hardship to a qualifying relative**
  * "substantially beyond" (*Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001))
  * USC or LPR spouse, parent, or child
    * "child" defined as under 21
    * includes stepparent and stepchild
  * Aggregate analysis but EEUH to "a" qualifying relative
* **Not ineligible under section 240A(c) of the Act**
* **Warrants favorable exercise of discretion**

NACARA Special Rule Cancellation of Removal

- 8 C.F.R. §§ 1240.60-1240.70 -

* **Alien is an individual described in 8 C.F.R. § 1240.61**

* ***If not removable under sections 212(a)(2) or (3), or 237(a)(2), (3), or (4):***
  * 7 years of continuous physical presence
  * Good moral character during 7-year period
  * Extreme hardship to alien or a qualifying relative
    * Rebuttable presumption of extreme hardship. 8 C.F.R. § 1240.64(d))

Note: Board has held application is continuing for cpp and gmc, but 8th and 9th Circuits have disagreed. *Compare Matter of Garcia*, 24 I&N Dec. 179 (BIA 2007), *with Aragon-Salazar v. Holder*, 769 F.3d 699 (9th Cir. 2014), *and Cuadra v. Gonzales*, 417 F.3d 947 (8th Cir. 2005).

NACARA Special Rule Cancellation of Removal

- 8 C.F.R. §§ 1240.60-1240.70 -

* ***If removable under those sections, heightened burden:***
  * Not convicted of an aggravated felony
  * 10 years of continuous physical presence following commission of most recent act
  * Good moral character during 10-year period
  * Exceptional and extremely unusual hardship to alien or qualifying relative
* **Warrants favorable exercise of discretion**

VAWA Special Rule Cancellation of Removal

- INA § 240A(b)(2) -

* **Any alien** (including LPR, *see Matter of A-M-*, 25 I&N Dec. 66 (BIA 2009))
* Who has been **battered or subjected to extreme cruelty**, or whose **child has been battered or subjected to extreme cruelty**
  * See 8 C.F.R. § 204.2(c)(1)(vi)
* **By spouse, putative spouse, or parent**
* **Abuser is or was USC or LPR**

VAWA Special Rule Cancellation of Removal

- INA § 240A(b)(2) -

* **3 years of continuous physical presence**
  * Stop-time exception – service of NTA does not end cpp
  * Exception for absence connected to battery or extreme cruelty
* **Good moral character during 3-year period**
  * Exception to 101(f) – if not disqualified from relief, conviction connected to abuse will not bar good moral character
* **Not removable under sections 212(a)(2) or (3), or 237(a)(1)(G), (2), (3), or (4)**
* **No aggravated felony conviction**

VAWA Special Rule Cancellation of Removal

- INA § 240A(b)(2) -

* **Extreme hardship to self, child, or parent**
  * 8 C.F.R. § 1240.58
  * No lawful status requirement
* **Merits favorable exercise of discretion**
  * *Matter of M-L-M-A-*, 26 I&N Dec. 360 (BIA 2014); *Matter of A-M-, supra*

Note: Adjudicator must consider "any credible evidence relevant"

Section 240A(c) bars do not apply

Breaks in Presence and Termination of Presence

Joan B. Geller

Termination of Presence: Stop-time Rule

- INA § 240A(d)(1) -

* Continuous residence or continuous physical presence **ends:**
  * when charging document served, or
  * when alien commits an offense *referred to* in section 212(a)(2) *that renders the alien inadmissible* under section 212(a)(2) or removable under sections 237(a)(2) or 237(a)(4)
  * whichever is earliest

What triggers the stop-time rule?

Service of charging document

* **"when the alien is served a notice to appear under section 239(a)"**
* **The charging document served in the proceedings in which the alien applies for cancellation of removal**
  * not a charging document served in any prior proceeding. *Matter of Cisneros*, 23 I&N Dec. 668 (BIA 2004)
  * not a charging document that was served but never filed in Immigration Court to commence removal proceedings. *Matter of Ordaz*, 26 I&N Dec. 637 (BIA 2015)

What triggers the stop-time rule?

Service of charging document

* **Circuit split on effectiveness of NTA that does not specify time/date of hearing**
  * *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011) - stop-time triggered by service of NTA stating time/date "to be set"
  * 2nd, 4th, 6th, 7th, and 9th Circuits agree/deference to *Camarillo*; 1st (implicit), 11th (unpublished)
  * 3rd Circuit - stop-time not triggered by NTA that does not state date/time/place of hearing in conformance with INA § 239(a). *Orozco-Velasquez v. Att'y Gen.*, 817 F.3d 78 (3d Cir. 2016)

What triggers the stop-time rule?

Commission of offense

* "when the alien has committed an offense **referred to** in section 212(a)(2) that **renders the alien inadmissible** to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4)"

* **Offense must be one "referred to in § 212(a)(2)"**
  * *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000) (firearms offense)
  * *Matter of Garcia*, 25 I&N Dec. 332 (BIA 2010) (petty offense exception)

What triggers the stop-time rule?

Commission of offense

* ***Commission* of offense terminates accrual, regardless of whether offense is basis for charge of removal** - *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006)

* **Circuit split on retroactivity to offense committed prior to IIRIRA**
  * Board has held pre-IIRIRA commission of offense triggers stop-time rule. *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006); *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999)
  * 1st Circuit agrees
  * 4th, 7th, 9th Circuits - stop-time rule not retroactive to pre-IIRIRA conviction if eligible when IIRIRA enacted

Effect of stop-time rule

* **"Termination of continuous period"**
  * *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000) (terminate means to "permanently stop")
  * "shall be deemed to end"

Effect of stop-time rule

* **Once period of residence or physical presence *ends* pursuant to the stop-time rule, accrual cannot restart**
  * *Matter of Nelson*, 25 I&N Dec. 410 (BIA 2011) (a departure and re-entry (2-day trip to Canada) does not reset the clock)
  * *Matter of Cisneros*, 23 I&N Dec. 668 (BIA 2004) (new period accrues after removal, and NTA in prior proceedings does not stop time)

Breaks in continuous physical presence

What is a "break?"

* **Statutory breaks**
  * INA § 240A(d)(2): 90-day bar and aggregate 180-day bar
* **Departure compelled by threat of proceedings**
  * *Matter of Romalez*, 23 I&N Dec. 423 (BIA 2002)
* **Departure after conviction for illegal entry**
  * *Matter of Velasquez-Cruz*, 26 I&N Dec. 458 (BIA 2014) (departure after functional equivalent to finding of inadmissibility)

What is a "break?"

* *Matter of Avilez*, 23 I&N Dec. 799 (BIA 2005):
  * exclusion at POE
  * expedited removal order
  * permitted to withdraw application for admission
  * any other formal, documented process pursuant to which the alien is determined to be inadmissible

What is a "formal, documented process?"

* Voluntary return constitutes break **if alien was advised of right to hearing before IJ and affirmatively agreed to depart in lieu of removal proceedings.** *Matter of Castrejon-Colino*, 26 I&N Dec. 667 (BIA 2015)
    * Being fingerprinted and/or photographed is not enough
    * Does not have to occur at or near border

What is the effect of a "break?"

* **Begin accruing new period of presence after break**
  * Different statutory language
  * Break is a temporary "interruptive event" (*Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000))

Good Moral Character

Presented by Rosaly Kozbelt,
Attorney Advisor

Definition of GMC

"Good moral character should not be construed to mean moral excellence, nor is it destroyed by a single lapse. It is a concept of a person's natural worth derived from the sum-total of all his actions in the community . . . Reputation which will pass muster with the average man is required; and that not every violation of law establishes bad moral character."

Matter of U--, 2 I&N Dec. 830, 831-32 (BIA 1947); *see also Matter of T--*, 1 I&N Dec. 158 (BIA 1941)

Definition of GMC

* Definition found at INA § 101(f):
  * For the purposes of this Act—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was

Definition of GMC

* (1) a habitual drunkard;
* (2) [*Removed*]
* (3) a member of one or more of the classes of persons, whether inadmissible or not, described in 212(a)(2)(D) [**prostitution**], (6)(E) [**smugglers**], and (10)(A) [**polygamists**]; (A) [**CIMTs**], (B) [**multiple criminal convictions**], or (C) [**controlled substance traffickers**] (except single offense of simple possession of 30g or less of marihuana), if the offense was convicted or committed during such period;

Definition of GMC

* (4) one whose income is derived principally from illegal **gambling** activities;
* (5) one who has been convicted of two or more **gambling** offenses committed during such period;
* (6) one who has given **false testimony** for the purpose of obtaining any benefits under this Act;

Definition of GMC

* (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of **one hundred and eighty days** or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;
* (8) one who at any time has been convicted of an **aggravated felony** (as defined in subsection (a)(43)); or

Definition of GMC

* (9) one who at any time has engaged in conduct described in section 212(a)(3)(E) (relating to assistance in Nazi persecution, participation in **genocide**, or commission of acts of torture or extrajudicial killings) or 212(a)(2)(G) (relating to severe violations of religious freedom).

* **Catchall:** The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

Definition of GMC

* In the case of an alien who makes a **false statement or claim of citizenship**, or who registers to vote or votes in a Federal, State, or local election *and*
  * Each parent of the alien was/is a USC
  * Alien permanently resided in US prior to age 16
  * Alien reasonably believed s/he was a USC at the time

  Then no finding that alien lacks GMC.

Definition of GMC

* *Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991)
  * Repeated that GMC "does not mean moral excellence and that it is not destroyed by a single lapse"
  * Fact-finder may require evidence of changed character.
  * Greater the misconduct, the longer the period of good conduct required to show GMC.

GMC: When do you need it?

* NACARA: 8 C.F.R. § 240.66(a)(3) [7yr]
* Old suspension of deportation: 8 C.F.R. § 240.65(b)(2) [7yr]
* Naturalization: INA § 316(a), (d), (e) [5yr]
* VAWA Cancellation: INA § 240A(b)(2)(A)(iii) [3yr]
* Voluntary Departure: INA § 240B(b)(1)(B) [5yr]
* Non-LPR Cancellation: INA § 240A(b)(1)(B) [10yr]

GMC: The Timeline

* In cancellation of removal, good moral character must be demonstrated "during such period"
* In voluntary departure, it is required "immediately preceding the alien's application"
* So what does that mean?

GMC: The Timeline

* This was a real issue. Three possibilities:
  1. The 10 year period used to determine continuous physical presence, bounded at the end by the service of the **NTA** or charging document. (Like stop-time)
  2. The 10 year period ending on the date that the 42B application is first **filed** with the court.
  3. The 10 year period is measured by looking backward from the time a **final administrative order** is rendered.

GMC: The Timeline

Example:

* Alien enters the US EWI in June 2000.
* In Dec. 2001, A pays a smuggler to bring sister.

1. NTA issued Dec. 2010.
   * 10y = Dec. 2000-Dec. 2010
2. 42B filed June 2011.
   * 10y = June. 2001-June 2011
3. Final admin order by BIA in Dec. 2013.
   * 10y = Dec. 2003-Dec. 2013

* Now imagine A lied to IJ about smuggling at hearing Dec. 2012.

GMC: The Timeline

* *Matter of Ortega-Cabrera*, 23 I&N Dec. 793 (BIA 2005)
  42B is a continuing application (so is VD, but 5yr)
  * GMC is measured as **10 years counted backward from the final administrative decision.**
    * 10 years is firm—so if the appeal process drags on, things initially inside 10y will fall outside.

GMC: The Timeline

* Circuit support for *Matter of Ortega*:
  * *Rodriguez-Avalos v. Holder*, 788 F.3d 444 (5th Cir. 2015) (granting *Chevron* deference)
  * *Duron-Ortiz v. Holder*, 698 F.3d 525 (7th Cir. 2012) (using *Chevron*)
  * *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009) (accepting without analysis)
* Suggesting they agree, but not deciding:
  * *Tiscareno-Garcia v. Holder*, 780 F.3d 205 (4th Cir. 2015)
  * *Jaimez-Perez v. Att'y Gen.*, 563 F.App'x 136 (3d Cir. 2014)

GMC: The Timeline

ALSO

* *Matter of M-L-M-A-*, 26 I&N Dec. 360 (BIA 2014)
  * **VAWA Cancellation** is also a continuing application (3yr calculated backward from final administrative decision)

GMC: The Timeline

BUT

* *Cuadra v. Gonzales*, 417 F.3d 947 (8th Cir. 2005) (same)
* *Aragon-Salazar v. Holder*, 769 F.3d 699 (9th Cir. 2014)
  * **NACARA is not a continuing application.** The 7yrs for GMC end on the **date of filing** of the application.
  * It is weird you can lie during your immigration proceedings, but it's still a discretionary application.
  * Dissent: we should have reached *Chevron*, step 2.

GMC: Per se categories (f)(1)

* **(1) habitual drunkard**
* *Ledezma-Cosino v. Lynch*, 819 F.3d 1070 (9th Cir. 2016), *reh'g en banc*, 839 F.3d 805 (9th Cir. 2016). Reheard Jan. 18, 2017.
  * Alcoholism is a medical disability, not a moral character flaw
* Prior to *Ledezma-Cosino*, there were 2 BIA cases from the 1950s. After, there haven't been any from BIA or Circuits.

GMC: Per se categories (f)(2)

* **(2) adultery (repealed 1981)**
* Example: *Allund v. Marshall*, 461 F.2d 710 (5th Cir. 1972)
  * Vol. Dept. No conviction for adultery required (but it must be a crime in the state)
  * Gov't was justified in finding R did not meet burden of showing GMC when she had 3 kids born out of wedlock with a married man.

GMC: Per se categories (f)(3)

* **(3) CIMTs, smuggling, prostitution, drugs, mult conv**
  * **CIMT**
    * *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967)
      * Vol. Depart. Petty offense exception waives a per se GMC problem, but you can still consider it in the catchall.
    * *Matter of Garcia-Hernandez*, 23 I&N Dec. 590 (BIA 2003); *see also Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010).

GMC: Per se categories (f)(3)

* **Smuggling**

* *Urzua Covarrubias v. Gonzales*, 487 F.3d 742 (9th Cir. 2007) (collected money from siblings and arranged payment to smuggler)

* *Ramos v. Holder*, 660 F.3d 200 (4th Cir. 2011) (sent money to bring children across the border. No need to be physically present at border. Financial assistance sufficient).

GMC: Per se categories (f)(3)

* **Smuggling con't**

* *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) ("[W]e find the meaning of the statutory text to be clear": waiver for smuggling family members not applicable to cancellation)

  * Concurrence: "In short, a person who leaves his family behind as he seeks better opportunities in the United States may have good moral character, but a person who attempts to bring a spouse or child along may not. This . . . grossly distorts the meaning of the term good moral character." (internal quotations omitted).

GMC: Per se categories (f)(3)

* **Smuggling con't**

* *Sanchez v. Holder*, 560 F.3d 1028 (9th Cir. 2009) (waiver for smuggling family not applicable to cancellation)
  * Dissent: "How can we possibly say members of Congress intended that a man who married his hometown sweetheart, brought her here for a better life, worked hard for twenty-one years to provide for his three children, bought a home, attended church regularly, and cared for his ailing father is a man of bad moral character? . . . How can we condemn this behavior as 'bad moral character'[?]"

GMC: Per se categories (f)(3)

* **Controlled Substances**

* *United States v. Suarez*, 664 F.3d 655 (7th Cir. 2011)
  * Natz. Commission of qualifying offense during GMC period, even if convicted after that period, **must be** found to be a lack of GMC.

GMC: Per se categories (f)(4)

* **(4) income is derived principally from illegal gambling activities**
* *Matter of S-K-C-*, 8 I&N Dec. 185 (BIA 1958)
  * Suspension of deportation. Gambling added in 1956 and made retroactive.
  * R was a dealer at Chinese dominoes and fan-tan at rec club in Seattle for 6 months in 1956, at $35/week. Bets were limited to $1, house collected 10%.
  * Gambling was licensed in city, but illegal in the state.
  * "principally" from gambling b/c R couldn't find another job. Need not be principally derived during 10yr span.

GMC: Per se categories (f)(5)

* **(5) convicted of two or more gambling offenses committed during such period**
* No examples.

GMC: Per se categories (f)(6)

* (6) false testimony

GMC: Per se categories (f)(6)

* *Kungys v. United States*, 485 U.S. 759 (1988) (Scalia)
  * "Testimony is limited to oral statements made under oath"
  * "[E]ven the most **immaterial** of lies with the subjective intent of obtaining immigration" benefits is enough.
  * NOT for lies based on "embarrassment, fear, or a desire for privacy"

GMC: Per se categories (f)(6)

* *Matter of Gomez-Beltran*, 26 I&N Dec. 765 (BIA 2016)
  * Whether the evidence is sufficient to establish false testimony is a case-by-case assessment for the trier of fact.
  * We rely on people to tell the truth!
* *Matter of R-S-J-*, 22 I&N Dec. 863 (BIA 1999)
  * The AO is a court or tribunal (for 9th Cir). Lie to them = false testimony

GMC: Per se categories (f)(6)

* First Circuit has covered this the most
  * *Toribio-Chavez v. Holder*, 611 F.3d 57 (1st Cir. 2010) (failed to disclose prior marriage and children at AOS interview)
  * *Restrepo v. Holder*, 676 F.3d 10 (1st Cir. 2012) (false testimony to IJ regarding divorce)
  * *Akwasi Agyei v. Holder*, 729 F.3d 6 (1st Cir. 2013) (false testimony in marriage interview. Only "fear" was of getting caught)
  * *Reynoso v. Holder*, 711 F.3d 199 (1st Cir. 2013) (false testimony at AOS interview for sham marriage & IJ)

GMC: Per se categories (f)(6)

* Other examples:
  * *Fatunmbi v. Att'y Gen.* 78 F.App'x 814 (3d Cir. 2003) (chemistry ph.d. lied for imm benefits—remand/grant)
  * *Beltran-Resendez v. INS*, 207 F.3d 284 (5th Cir. 2000) (said USC on I-9—not testimony)
  * *Goswell-Renner v. Holder*, 762 F.3d 696 (8th Cir. 2014) (said never married at AOS interview when she was)
  * *Quezada-Duarte v. Holder*, 418 F.Appx. 754 (10th Cir. 2011) (testified application true/correct, but errors-arrest)

GMC: Per se categories (f)(6)

* **Doctrine of Retraction**
  * *Matter of M--*, 9 I&N Dec. 118 (BIA 1960)
    * VD. timely and voluntary retraction without delay
  * *Matter of Namio*, 14 I&N Dec. 412 (BIA 1973)
    * VD. Lied to CBP, admitted it to IJ ~ a year later.
    * Recantation must be voluntary and without delay. Disclosure of falsity was imminent, so no good.

GMC: Per se categories (f)(6)

* *Ruiz-Del-Cid v. Holder*, 765 F.3d 635 (6th Cir. 2014)
  * In 1993, asylum application said R threatened by guerillas. In 2007 AO interview, R repeated the story.
  * In 2011 before IJ, R independently retracted it.
  * Held: voluntary and timely retraction!
    * Length of time between misrepresentation and retraction need not be determinative of timeliness. Just voluntarily confess at the next appropriate opportunity.
    * Don't punish R for immigration system moving slowly!
  * Dissent

GMC: Per se categories (f)(7)

* **(7) confined 180 days in penal institution, aggregate**
  * *Gomez-Lopez v. Ashcroft*, 393 F.3d 882 (9th Cir. 2005) (confinement in any facility—fed/state/local—as a result of conviction is "penal institution")
  * *Arreguin-Moreno v. Mukasey*, 511 F.3d 1229 (9th Cir. 2008) (pre-trial detention counts for days confined)
  * *Tiscareno-Garcia v. Holder*, 730 F.3d 205 (4th Cir. 2015) (jail time is a proxy for seriousness, not about the crime)
  * *Rodriguez-Avalos v. Holder*, 788 F.3d 444 (5th Cir. 2015) (180days for all crimes, not just for CIMTs)

GMC: Per se categories (f)(7)

* *Garcia-Mendoza v. Holder*, 753 F.3d 1165 (10th Cir. 2014)
  * R couldn't afford bail, so 104 days pre-trial and then sentenced to 270 days with credit for time served. Served 197.
  * Asked court to resentence him nunc pro tunc to 166 days with no credit for time served—and court did so.
  * Held: 180 days is actual days served, not about the sentence.

GMC: Per se categories (f)(8)

* **(8) aggravated felony committed at any time**
  * *Castiglia v. INS*, 108 F.3d 1101 (9th Cir. 1997) (Natz. Murder is a bar regardless of conviction date)
  * *Chan v. Gantner*, 464 F.3d 289 (2d Cir. 2006)
    * Natz. Conspiracy to smuggle aliens. On conviction date, not an agfel. IIRIRA retroactive.
    * **212(c) doesn't cure**; waiver lets you stay in US not expunge conviction (3/5/9th circuits agree)

GMC: Per se categories (f)(8)

* *Puello v. BCIS*, 511 F.3d 324 (2d Cir. 2007)
  * Natz. Tried to sell kg of cocaine to undercover officer. Not an agfel at time of plea, but was by sentencing.
  * Held: Conviction occurs when judgment entered onto docket by the court, not at the time plea accepted.

GMC: Catchall

* **Catchall: False USC claims**
  * *Matter of Guadarrama De Contreras*, 24 I&N Dec. 625 (BIA 2008)
    * I-9 falsified
    * Held: False USC claim *may* be considered in catchall, but not mandated

GMC: Catchall

* *Posusta v. United States*, 285 F.2d 533, 535 (2d Cir. 1961) (Hand, J.)
  * "[I]t is settled that the test [of good moral character] is **not the personal moral principles of the individual judge** or court before whom the applicant may come; the decision is to be based upon what he or it believes to be the **ethical standards current at the time**."
  * "The (naturalization) statute is not penal; it does not mean to punish for past conduct, but to admit as citizens those who are likely to prove law-abiding and useful. Their **past is of course some index of what is permanent in their make-up, but the test is what they will be**, if they become citizens."

GMC: Catchall

* **Catchall**
  * USC claims
    * *Torres-Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986); *Gomez-Borboa v. Holder*, 583 F.Appx. 687 (9th Cir. 2014) (must balance factors, not just the negative as in per se)

GMC: Catchall

FACTORS TO CONSIDER.

* *Torres-Guzman v. INS*, 804 F.2d 531 (9th Cir. 1986); *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995) (VD)
  * School record; Family background
  * Employment history; Financial status;
  * Criminal record (if any, including arrests not resulting in conviction—goes to weight); rehabilitation
  * Length of residence; service to community

GMC: Catchall

EXAMPLES OF BALANCING OF FACTORS

* **Driving violations**
  * *Portillo-Rendon v. Holder*, 662 F.3d 815 (7th Cir. 2011)
    * Multiple DWIs both before and after alcohol treatment/rehab
    * *Also* driving without a license, high speed flight to avoid arrest

GMC: Catchall

* **Taxes**
  * *Sumbundu v. Holder*, 602 F.3d 47 (2d Cir. 2010)
    * Misreport income from 1996-2004 while living in taxpayer subsidized housing
    * IJ may (but not required to) consider: Intent to commit misconduct/ misrepresent a "substantial sum" on ones tax forms.

GMC: Catchall

* **Criminal Record**
  * *Mesura v. Holder*, 563 F.App'x. 34 (2d Cir. 2014)
    * Six convictions, all misdemeanors not resulting in jail time
  * *Ikenokwalu-White v. INS*, 316 F.3d 798 (8th Cir. 2003)
    * 3 old misdemeanor convictions that were expunged: theft and battery; 2 x welfare fraud
    * 1984 sham marriage with man of diminished capacity
    * Past crimes may not be *sole* basis for denial, but may be considered in light of more **recent conduct**:
      * protection order not filed in good faith, threats against a school counselor, etc.

GMC: Reviewability by Circuit Courts

	Per Se	Catchall
Reviewable	1, 2, 3, 4, 5, 8, 9	8
Maybe	6, 11	2
Not Reviewable	None	1, 5, 7, 9, 11
Unknown	7, 10	3, 4, 6, 10

The most common answer is marked in red.

GMC: Reviewability by Circuit Courts

* **Per se reviewable**
  * *Reynoso v. Holder*, 711 F.3d 199 (1st Cir. 2013) (per se category is a factual finding reviewed for substantial evidence)
  * *Sepulveda v. Gonzales*, 407 F.3d 59 (2d Cir. 2005); *Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010)
  * *Fatunmbi v. Att'y Gen.*, 78 F.Appx. 814 (3d Cir. 2003) (unpublished) (per se are reviewable)

GMC: Reviewability by Circuit Courts

* **Per se reviewable con't**
  * *Deloras Jean v. Gonzales*, 435 F.3d 475 (4th Cir. 2006) (per se is application of law to fact)
  * *Omagah v. Ashcroft*, 288 F.3d 254 (5th Cir. 2002)
  * *Ikenokwalu-White v. INS*, 316 F.3d 798 (8th Cir. 2003) (reviewing per se category for substantial evidence)
  * *Espinoza-Garcia v. Sessions*, 2017 WL 695109 (9th Cir. 2017) (unpublished)
  * *Chavez Roman v. US Att'y Gen.*, 518 F.Appx. 624 (11th Cir. 2013) (maybe); *Ruiz-Del-Cid v. Holder*, 765 F.3d 635 (6th Cir. 2014)

GMC: Reviewability by Circuit Courts

* **Catchall not reviewable (discretion)**
  * *Reynoso v. Holder*, 711 F.3d 199 (1st Cir. 2013)
  * *Muratoski v. Holder*, 622 F.3d 824 (7th Cir. 2010); *Portillo-Rendon v. Holder*, 622 F.3d 815 (7th Cir. 2011)
  * *Espinoza-Garcia v. Sessions*, 2017 WL 695109 (9th Cir. 2017) (unpublished)
  * *Jimenez-Galicia v. U.S. Att'y Gen.*, 690 F.3d 1207 (11th Cir. 2012)

GMC: Reviewability by Circuit Courts

* **Catchall (maybe/definitely) reviewable**
  * *Sumbundu v. Holder*, 602 F.3d 47 (2d Cir. 2010) (reviewable if it raises a question of law, like EEUH); *Mesura v. Holder*, 563 F.Appx. 34 (2d Cir. 2014) (unpublished) (assuming jurisdiction of catchall and reviewing equities for substantial evidence)
  * *Ikenokwalu-White v. INS*, 316 F.3d 798 (8th Cir. 2003) (catchall reviewable)

GMC: Reviewability by Circuit Courts

* A word of caution: a starting point, not an end point
  * Some of these cases are old, using transitional rules
  * But not that many get issued on the topic, so this is my best assessment of what is out there.

The end

VOLUNTARY DEPARTURE

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Presented by

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Voluntary Departure

What is it?

Permits an alien to leave the United States voluntarily and "at the alien's own expense" without formal removal.

Voluntary Departure

Why would an alien want it?

- Avoid removal order.
- Subsequent return to the United States may be easier if desired.
- But – carries risk of penalties & adverse consequences if non-compliant.

Voluntary Departure (cont.)

Where is it?

- Section 240B of the Act.
- 8 C.F.R. § 1240.26.
- Case law.

Voluntary Departure (cont.)

Who has the burden?

- Respondent, who must demonstrate:
  - (1) eligibility, and
  - (2) that he or she warrants a favorable exercise of discretion.

Voluntary Departure – Three Types

- **DHS** - prior to initiation of removal proceedings.
- **Pre-Conclusion** - at the initial stages of removal hearing. Section 240B(a) of the Act.
  - FEWER REQUIREMENTS; REDUCED LITIGATION OPTIONS.
- **Post-Conclusion** - at the conclusion of the removal hearing. Section 240B(b) of the Act.
  - MORE REQUIREMENTS; INCREASED LITIGATION OPTIONS.
- *See Matter of Arguelles-Campos*, 22 I&N Dec. 811 (BIA1999) (detailed discussion of all three types).

Bars to Eligibility – Both Types

- **Past Grant of VD** – ineligible if granted VD in the past after being found inadmissible under 212(a)(6)(A) (in the U.S. without admission or parole).
  - 240B(c); 8 CFR § 1240.26 (previously granted VD and failed to depart).
- **Removable under 237(a)(4)** (security and related grounds, including terrorist activity).
  - 240B(a)(1); 8 CFR §§ 1240.26(b)(1)(i)(E), 1240.26(c)(1)(iii).
- **Convicted of an aggravated felony**
  - 240B(a)(1); 8 CFR §§ 1240.26(b)(1)(i)(E) and 1240.26(c)(1)(iii).
  - Section 101(a)(43) of the Act (aggravated felony definition).

Comparison of Voluntary Departures

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Pre-conclusion VD	Post-conclusion VD
Must request before or at the Master Calendar	May request at any time before conclusion
Must concede removability	Need not concede removability
Cannot apply for other relief and must waive appeal of all issues	Need not waive appeal but cannot appeal time granted

Comparison of Voluntary Departures (cont.)

Pre-conclusion VD	Post-conclusion VD
No minimum presence required	1-year physical presence required
More can qualify	GMC for ≥ 5 years
No need to show Means and Intent to Depart	Must show Means and Intent to Depart
120 days max + no bond required	60 days max + $500 minimum bond

Pre-conclusion

8 CFR § 1240.26(b).

- Timing element (30 days after MC hearing, etc.).
  - *See Matter of Cordova,* 22 I&N Dec. 966 (BIA 1999) (discussing what is a "master calendar" hearing).
- Stipulated grant possible at anytime.
- R can make no additional requests for relief (must withdraw any pending requests).
- R must concede removability.
- Arriving aliens not eligible.

Pre-conclusion (cont.)

- **R must waive appeal of all issues.**
  - Express waiver by R or R's counsel; a "constructive waiver" will not suffice. *Matter of Ocampo*, 22 I&N Dec. 1301 (BIA 2000).
  - Knowing and intelligent waiver.
    - *See, e.g., Narine v. Holder*, 559 F.3d 246 (4th Cir. 2009) (remanding where pro se alien did not have clear understanding of consequences of waiver).
  - Waiver usually found in transcript.

Post-conclusion

8 CFR § 1240.26(c).

- At least 1 year of physical presence preceding service of NTA.
- Good moral character for at least 5 years immediately preceding application (ongoing application).
  - GMC definition at INA § 101(f)–use guidance from cases addressing other forms of relief.
- Clear and convincing evidence of means and intent to depart the United States.

Discretion

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- Discretion is an element for both kinds of VD.
- Weigh positive and negative factors including:
  - the nature and underlying circumstances of the removal grounds at issue,
  - additional violations of the immigration laws,
  - the existence, seriousness, and recency of any criminal record,
  - other evidence of bad character or the undesirability of the applicant as a permanent resident,
  - length of residence,
  - family ties in the US, and
  - humanitarian needs.

Matter of Arguelles-Campos, 22 I&N Dec. 811, 817 (BIA 1999) (citing to *Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972)).

Fines, Bond & Conditions

- **Fines**
  - Pre & post - IJ sets a fine for failure to depart.
  - There is a rebuttable presumption of a $3,000 amount.
  - 8 CFR § 1240.26(j).
- **Bond**
  - Not mandatory for pre-conclusion.
  - Mandatory for post-conclusion.
    - Amount necessary to ensure that the alien departs within the time specified.
    - Not less than $500.
    - 8 CFR § 1240.26(c)(3)(i).

Fines, Bond & Conditions (Cont.)

- **Conditions**
  - May be imposed as IJ "deems necessary to ensure the alien's timely departure from the United States."
    8 CFR §§ 1240.26(b)(3)(i) - (pre), (c)(3) - (post).
    - Pre-conclusion – includes posting of bond.
    - Post-conclusion – IJ has broad discretion to set conditions and safeguards.
  - IJ should advise of conditions before grant.

Conditions, Cont.

Matter of M-A-S-, 24 I&N Dec. 762 (BIA 2009)

- IJs may also order continued detention of alien until his/her VD.
- No language explicitly stating "continued detention," but 8 C.F.R. § 1240.26(c)(3) gives IJs broad discretion to set conditions for VD.
- Where continued detention is ordered, no sense in requiring a bond, because the purpose of the bond is fully served.

Travel Documents

Generally, R must provide a passport or other travel documentation sufficient to assure a lawful entry into the country to which R is departing, with certain exceptions.

- 8 CFR § 1240.26(b)(3)(i) (pre-conclusion).
- 8 CFR § 1240.26(c)(2) (post-conclusion).

Different Types of Advisals

- Advisals regarding potential eligibility for relief.
- Advisals regarding requirements and consequences.
- IJ – before opportunity to request and at time of grant.
- BIA - when reinstating VD on appeal.

IJ - Advisals Regarding Potential Eligibility

- IJ must advise R of forms of relief for which he/she is apparently eligible, including VD.

  Matter of Cordova, 22 I&N Dec. 966, 970, n.4 (BIA 1999); 8 CFR § 1240.11(a)(2).

- Advisals must be timely, *e.g.*, pre-conclusion applies only in early stages of proceedings.

  Matter of Cordova, supra.

Advisals, Eligibility (cont.)

- If R not eligible for pre-conclusion, then IJ must consider availability of post-conclusion VD.

  See Matter of C-B-, 25 I&N Dec. 888 (BIA 2012) (remanded where R indicated he would not waive appeal so not eligible for pre-conclusion, but IJ did not consider his eligibility for post-conclusion).

- IJ must be clear whether addressing pre and post in giving advisals and when issuing decision.

  Matter of C-B-, supra.

Advisals Regarding Consequences and Eligibility

- In regulations.
- IJs usually use form order.
- IJ may also advise at end of hearing or in decision.

Advisals (Cont.)

- **Consequences of failing to voluntarily depart -**
  - Alternative order of removal (issued by IJ) will automatically take effect.
- **Penalties -**
  - An alien who fails to depart within the time period specified in the VD order becomes subject to a civil penalty between $1,000 and $5,000.

Advisals (Cont.)

- **Other Adverse Consequences -**
  - Alien ineligible for all forms of discretionary relief (INA §§ 240A, 245, 248, & 249) for 10 years after the date the alien was supposed to depart. *See* section 240B(d)(1)(B).
  - Note: if granted in 1995 or earlier – automatic bar of 5 years rather than 10

Advisals (Cont.)

- **Bond**
  - Amount to be posted, and duty to post within **5 days** of IJ's order (before grant).
  - Consequence of not timely posting bond: VD order vacates and alternate removal order takes effect. *See* 8 CFR § 1240.26(c)(3).
  - If appeal filed, proof to BIA that bond timely paid within **30 days** of filing the appeal or Board will not reinstate VD.

Advisals (Cont.)

- **Motions**
  - If R files MTR or MTRecon within VD period, VD grant automatically terminates, and the alternate removal order takes effect immediately. 8 CFR § 1240.26(c)(3)(iii), (e)(1); *see also* 8 CFR § 1240.11(b).
  - For full picture of interplay of VD grants, motions (including untimely motions), and the filing of PFRs, see the regulations. *E.g.*, 8 CFR §§ 1240.26(e)-(i).

Reviewing the Record on Appeal

- **R cannot appeal length of VD.**

  8 CFR § 1240.26(g).

- **Pre and post often have different issues**
  - *e.g.*, pre – if granted below, first question is whether we have jurisdiction – usually comes to appeal waiver.
  - Otherwise – if pre or post denied, questions usually:
    - did IJ properly advise?
    - is R eligible?
    - is R deserving of a favorable exercise of discretion?

Reviewing the Record on Appeal

- **Always check whether VD was requested and ruled upon.**
- **If granted, was bond paid?**
  - Look in record and tab bond receipt.
  - If paid, reinstate VD per macros; pay attention to # of days.
  - However, remember *M-A-S-* and continued detention cases.

Reviewing the Record on Appeal

- **If no bond receipt -**
  - Look and see if proper advisals given.
  - Could be in print out, at end of order, or in transcript.
  - If no warnings, remand may be required.
  - *See Matter of Gamero,* 25 I&N Dec. 164 (BIA 2015).
- **If bond not paid, alternate order of removal will come into play.**

Final Thoughts

- If you have an old deportation case, different rules apply.
- Do not forget about voluntary departure.
- Always mark bond documents and advisals.
- Change days where necessary – see macros.

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

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I,_____, certify that I have reviewed, in its entirety, the video presentation entitled, **Cancellation of Removal & Voluntary Departure: Issues in Appellate Adjudication**, sponsored by the Board of Immigration Appeals Training & Development Program.

Signature: _____

Date: _____